No. 92-1235

In the Supreme Court of the United States

OCTOBER TERM, 1992

DONALD O. MAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the *quid pro quo* element of extortion under color of official right.

2. Whether the district court's supplemental anti-deadlock instruction was impermissibly coercive.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Allen v. *United States*, 164 U.S. 492 (1896)	9
Evans v. *United States*, 112 S. Ct. 1881 (1992)	7, 8
Lowenfield v. *Phelps*, 484 U.S. 231 (1988)	9, 11
McCormick v. *United States*, 111 S. Ct. 1807 (1991)	7
Peterson v. *United States*, 213 F. 920 (9th Cir. 1914)	10
United States v. *Angiulo*, 485 F.2d 37 (1st Cir. 1973)	10
United States v. *Caceres*, 440 U.S. 741 (1979)	9
United States v. *Fioravanti*, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969)	9-10
United States v. *Flannery*, 451 F.2d 880 (1st Cir. 1971)	9
United States v. *Harris*, 391 F.2d 348 (6th Cir.), cert. denied, 393 U.S. 874 (1968)	10
United States v. *Nichols*, 820 F.2d 508 (1st Cir. 1987)	11
United States v. *Rey*, 811 F.2d 1453 (11th Cir.), cert. denied, 484 U.S. 830 (1987)	10
United States v. *Sawyers*, 423 F.2d 1335 (4th Cir. 1970)	9
United States v. *Scruggs*, 583 F.2d 238 (5th Cir. 1978)	11
United States v. *Silvern*, 484 F.2d 879 (7th Cir. 1973)	10
United States v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971)	9, 10

Statute:

Hobbs Act, 18 U.S.C. 1951	2

Miscellaneous: Page

Committee on Pattern Jury Instructions, U.S. Fifth Circuit Judges Ass'n, *Pattern Jury Instructions—Criminal Cases* (1983) 11
U.S. Attorneys' Manual:
1984 8
1988 9

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1235

DONALD O. MAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is unpublished, but the judgment is noted at 979 F.2d 1538 (Table).

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1992. The petition for a writ of certiorari was filed on January 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to ten months' imprisonment, to be followed by three years of supervised release, and he was fined $20,000. The court of appeals affirmed without opinion. Pet. App. A1.

1. In January 1989, petitioner was appointed to the Spalding County Planning Commission, which considers zoning and land use matters for Spalding County, Georgia. A few months later, petitioner met with Gerald Lawhorn, who sought to develop a shooting club—a place where hunters could shoot at clay targets thrown from machines, along with a clubhouse, restaurant, and lodges—on property Lawhorn owned in Spalding County. They agreed that Lawhorn would pay petitioner $5,400 to draft a new zoning classification that would allow Spalding to develop the shooting club on his property. Without revealing to the Planning Commission either his relationship with Lawhorn or that he had personally drafted the proposed new zoning classification, petitioner voted both on the amendment adding the new classification and on Lawhorn's application to rezone his property. Gov't C.A. Br. 3-5.

Petitioner drafted into the new zoning classification a requirement for pre-development approval by the Planning Commission. In June 1990, after petitioner had become chairman of the Planning Commission, Lawhorn was informed that the County building inspector had refused, at petitioner's direction, to issue Lawhorn a building permit. After meeting with petitioner concerning this matter, Lawhorn's attorney reported to Lawhorn that he believed petitioner wanted to be paid to

approve Lawhorn's pre-development plans. Gov't C.A. Br. 6-8.

At a meeting in June 1990, petitioner told Lawhorn that the pre-development plans did not conform to the applicable code. Petitioner added that he would be chairman of the Planning Commission for another two and one-half years, and he said that Lawhorn would have to compensate him for the work he would need to do to make the plans acceptable. Lawhorn understood petitioner to be demanding a payoff in order to get the plans approved by the Planning Commission. Lawhorn informed the local district attorney and the FBI of petitioner's proposal. Gov't C.A. Br. 8.

At a secretly recorded meeting on July 19, 1990, Lawhorn agreed to pay petitioner $6,500 to get his pre-development plans approved by the Planning Commission within six weeks. Five days later, after Lawhorn paid petitioner $3,500 as a down payment, petitioner guaranteed Lawhorn that he would vote to approve the plans and that other members of the Planning Commission would vote with him. Following the meeting, government agents stopped petitioner and seized the payment. Gov't C.A. Br. 9-10.

2. Petitioner was charged with extorting money from Lawhorn both through the wrongful use of economic fear and under color of official right. With respect to the "under color of official right" theory of extortion, the district court instructed the jury in pertinent part as follows. Pet. App. B7-B9:[1]

[1] The court gave the same instructions in the form of a supplemental charge on two occasions, in response to inquiries from the jury. See Pet. App. B17-B18, B29-B30.

Extortion under color of official right is the wrongful taking by a public official of money not due to him or his office. Extortion under color of official right does not require proof of specific acts by the public official demonstrating force, threat, or the use of fear, so long as the victim consented to giving over the money or property because of the office or position held by the official.

* * * * *

Furthermore, passive acceptance of property by a public official is sufficient to form the basis of extortion under color of official right if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. That is, the official need not take any specific action to induce the offering of the benefit.

* * * * *

Now, in order to establish a violation of the Hobbs Act due to extortion or attempted extortion under color of official right, it is not necessary that the government prove the defendant as a public official affirmatively demanded or solicited a payment in exchange for some specific exercise of the power of his position as a member of the * * * Planning Commission * * *.

All that must be established is that the defendant accepted or agreed to accept a payment to which he was not entitled, and that this payment was motivated by the victim's expectation of the defendant's exercise of his power as a public official, and that the defendant was aware that the payment or the intended payment was to be made in exchange for the performance of his official duties.

3. During the third day of deliberations the jury announced that it was deadlocked. Pet. App. B38. In response to that announcement, the district court gave a modified *Allen* charge as follows, *id.* at B39-B40:

> Ladies and gentlemen of the jury, I'm going to ask that you continue your deliberations in an effort to reach an agreement upon a verdict and dispose of this case, and I have a few additional comments that I would like for you to consider as you do so.
>
> This is, as I am sure you realize, an important case. The trial has been expensive [in] time, effort, money, and emotional strain to both the defense and the prosecution. If you should fail to agree upon a verdict the case will be left open and may have to be tried again. Obviously another trial would only serve to increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.
>
> Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.
>
> If a substantial majority of your number are in favor of conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves

> again and [m]ost thoughtfully whether you should accept the weight and the sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt.
>
> Remember that at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence, but after a full deliberation and consideration of the evidence in this case it is your duty to agree upon a verdict if you can do so.
>
> You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty. You may be as leisurely in your deliberations as the occasion may require, and you should take all the time which you may feel is necessary.

At the end of the day on which the *Allen* charge was given, the jury reached a verdict, convicting petitioner on one extortion count and acquitting him on another. Pet. App. B41.

4. On appeal, petitioner contended that the district court erroneously instructed the jury on the *quid pro quo* element of extortion under color of official right. Petitioner also contended that the district court's modified *Allen* charge was impermissibly coercive. The court of appeals rejected those claims without opinion. Pet. App. A1.

ARGUMENT

1. Petitioner contends (Pet. 22-28) that the district court inadequately instructed the jury on the *quid pro quo* element of a Hobbs Act offense.

In *McCormick* v. *United States*, 111 S. Ct. 1807, 1816 (1991), which involved the receipt of campaign contributions, this Court held that "[t]he receipt of such contributions is * * * vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." In *Evans* v. *United States*, 112 S. Ct. 1881, 1889 (1992), which involved the receipt of a $7,000 payment that was not dressed up as a campaign contribution, the Court held that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[2]

In this case, petitioner cannot claim that the payment from Lawhorn was a campaign contribution, since petitioner was not an elected official. Accordingly, the applicable standard is that set forth in *Evans*, which the district court's instructions closely followed. The district court instructed the jury that, in order to be guilty of extortion under color of official right, it is sufficient that the public official accept money knowing that the

[2] The difference is in the specificity of the agreement. It would not be a violation of the Hobbs Act to make a campaign contribution to a legislator because the legislator was generally in favor of protectionist trade policy and the contributor's business would profit from protectionist legislation. But, under *McCormick*, it would be a violation of the Hobbs Act for a candidate to accept a campaign contribution that was expressly conditioned on the candidate's agreement to vote in a particular manner on a specific matter. It would also be a violation of the Hobbs Act, under *Evans*, for a legislator to accept a cash payoff (not a campaign contribution) from a person the legislator knows to have an interest in protectionist legislation, where the legislator knows that the payment was made in return for the legislator's official acts of support for protectionist trade policies, even if no specific act was promised in exchange for the payment.

payment was offered "in exchange for a specific requested exercise of his official power." Pet. App. B8. The court subsequently reiterated that the government must show that the payment was "made in exchange for the performance of his official duties." *Id.* at B9. Those instructions were plainly consistent with this Court's holding that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 112 S. Ct. at 1889.

Petitioner does not contend that the above-quoted instructions were defective. Rather, he argues (Pet. 23) that they were fatally contradicted by the district court's instruction that "it is not necessary that the Government prove the defendant as a public official affirmatively demanded or solicited a payment in exchange for some specific exercise of the power of his position." Pet. App. B9. But particularly when read in conjunction with the instructions that preceded and followed it, the instruction on which petitioner focuses did not in any way contradict the court's instruction that the government was required to prove that Lawhorn's payment was made in exchange for petitioner's performance of an official act. Rather, the import of the challenged instruction was that, in order to violate the Hobbs Act, a public official need not induce ("affirmatively demand[] or solicit[]," in the words of the instruction) the payment. This Court held in *Evans* that the Hobbs Act does not require proof of inducement. 112 S. Ct. at 1883.[3]

[3] In 1984, in light of the then-existing uncertainty as to the scope of extortion under color of official right, the U.S. Attorneys' Manual advised prosecutors to use their discretion to limit prosecutions to cases involving high offices and large payoffs. U.S.Attorneys' Manual § 9-131.180 (1984). See *Evans*, 112 S. Ct. at 1904 (Thomas, J., dissenting). Petitioner argues (Pet. 24-27) that his prosecution violated that guideline. As an initial matter,

2. Petitioner contends (Pet. 28-33) that the district court erred by giving a modified *Allen* charge after the jury had informed the court that it had reached an impasse. The court of appeals properly rejected that claim.

In *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896), this Court held that it was proper for a district court to give a supplemental instruction to a deadlocked jury encouraging the jurors to be open-minded and to reconsider their views if possible during their deliberations so that a verdict might be reached. More recently, in *Lowenfield* v. *Phelps*, 484 U.S. 231, 237 (1988), the Court reaffirmed the principles underlying the *Allen* decision. Those principles, the Court added, "apply even with greater force in a case such as this, where the charge given, in contrast to the so-called 'traditional *Allen* charge,' does not speak specifically to the minority jurors." 484 U.S. at 237-238.

The principal criticism of instructions patterned on the charge in *Allen* has been that such instructions direct only jurors in the minority to reexamine their views. See, *e.g.*, *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971); *United States* v. *Thomas*, 449 F.2d 1177, 1183 (D.C. Cir. 1971); *United States* v. *Sawyers*, 423 F.2d 1335, 1342 (4th Cir. 1970); *United States* v. *Fioravanti*, 412 F.2d 407, 417 (3d Cir.), cert. denied, 396

however, petitioner failed to raise the issue below and thereby waived it. Second, internal Justice Department guidelines confer no rights on defendants; the Justice Department is the sole judge of whether a particular prosecution meets its own standards. See *United States* v. *Caceres*, 440 U.S. 741 (1979). Third, the amount of money involved in this case was substantial, and the office, although not a public position of high visibility, was an important position within the local county government. Finally, the guideline on which petitioner relies was repealed prior to petitioner's prosecution. See U.S. Attorneys' Manual § 9-131 (1988).

U.S. 837 (1969). Although the charge in this case suggested that if a substantial majority of jurors favored acquittal or conviction, the others should reconsider their views, it also stated that even if only a minority of jurors favored acquittal, the others should reconsider whether they should accept "the weight and the sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt." Pet. App. B39. Accordingly, the charge did not contain the much-criticized language suggesting that only the minority jurors should reexamine their views.

The charge in this case also did not suffer from the other principal defect attributed to some variations of the *Allen* charge—that they place undue emphasis on the prospect of a retrial and the costs that a retrial would impose on both parties. See, *e.g.*, *United States* v. *Rey*, 811 F.2d 1453, 1459 (11th Cir.), cert. denied, 484 U.S. 830 (1987); *United States* v. *Silvern*, 484 F.2d 879, 880-881 (7th Cir. 1973) (en banc); *United States* v. *Thomas*, 449 F.2d at 1183. In this case, the instruction stated only that if the jury did not reach a verdict, the case would be left open and might have to be tried again. The instruction thus informed the jury that a retrial was possible, not that it was inevitable. See *United States* v. *Harris*, 391 F.2d 348, 355-357 (6th Cir.), cert. denied, 393 U.S. 874 (1968). In addition, although the instruction referred to the expense of the trial and the expense of retrial, it did not dwell on those points. Compare *United States* v. *Angiulo*, 485 F.2d 37, 39 (1st Cir. 1973); *Peterson* v. *United States*, 213 F. 920, 924-926 (9th Cir. 1914).

Furthermore, the instruction at issue carefully balanced references to the consequences of a deadlocked jury with the admonition that the jurors should not feel compelled to surrender their honest convictions merely to reach a verdict, and it reminded the jury to return a verdict of not guilty if the evidence failed to establish the

defendant's guilt beyond a reasonable doubt. In sum, the instruction, viewed as a whole, was not impermissibly coercive. See *United States* v. *Nichols*, 820 F.2d 508, 511-512 (1st Cir. 1987).[4]

While there are differences in the anti-deadlock instructions approved by various courts of appeals, all the courts of appeals have upheld some form of supplemental jury charge advising jurors of their duty to deliberate and to attempt to reach a verdict. See *Lowenfield* v. *Phelps*, 484 U.S. at 238 n.1. There is no compelling need for a uniform anti-deadlock instruction for all circuits. Variety in the way courts remind juries of their duty to deliberate—like the variety in other jury instructions, such as the instruction on reasonable doubt—has been accepted practice in the federal system for years. See Committee on Pattern Jury Instructions, U.S. Fifth Circuit District Judges Ass'n, *Pattern Jury Instructions—Criminal Cases* 28 (1983). Unless and until this Court chooses to promulgate pattern jury instructions for the district courts throughout the nation, some variation among instructions, such as the anti-deadlock instruction, will be inevitable.

---

[4] Petitioner faults the supplemental charge (Pet. 33) for failing to inform the jury of its right not to reach a verdict. However, the charge stated that it was the jury's duty to agree on a verdict only "if you can do so." Pet. App. B40. Petitioner also argues (Pet. 33) that the charge was coercive because it was given on a Friday. The timing of an anti-deadlock instruction, however, is within the discretion of the district court, see *United States* v. *Scruggs*, 583 F.2d 238, 241 (5th Cir. 1978), and we know of no authority for the proposition that such an instruction may not be given the day before the weekend.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

APRIL 1993